

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

*Yeghazarian*

FILE: B-220399.2

DATE: June 16, 1986

MATTER OF: Corporate Health Examiners, Inc.

## DIGEST:

1. In negotiated procurements there is no requirement that award be made on the basis of the lowest cost. The procuring agency has the discretion to select a higher technically rated offeror if doing so is consistent with the evaluation scheme in the solicitation.
2. New grounds of protest initially presented subsequent to General Accounting Office's receipt of agency report on the protest are dismissed as untimely where it appears that new protest is based on information known to the protester at agency debriefing on its proposal which was held prior to the filing of the original protest.
3. The submission of a below-cost or a low profit offer is not illegal and provides no basis for challenging an award of a firm, fixed-price contract to a contractor who is determined to be responsible.
4. General Accounting Office in camera review of proposals and evaluation score sheets and summaries shows that the agency's technical evaluation of proposals was fair and reasonable.

Corporate Health Examiners (Corporate Health) has protested the award of two contracts to EHE/National Health Services Inc. (EHE) under request for proposals (RFP) No. 3059 issued by the Federal Bureau of Investigation, Department of Justice (FBI). The solicitation was for preemployment and fitness for duty physicals and health analysis for FBI and Drug Enforcement Administration (DEA)

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personnel in the New York and Philadelphia field offices and for the respective headquarters facilities in Washington, D.C.<sup>1/</sup>

The protests of the awards for medical services for the New York field offices and for Washington, D.C. are denied in part and dismissed in part.

Under the RFP, issued by the FBI on August 13, 1985, the government reserved the right to award a single firm, fixed-price contract, or separate contracts for each location, for the period through September 30, 1986, with the option to extend performance for four additional periods of 1 year each.

The deadline for the receipt of initial proposals was September 26, 1985, and both the protester's and EHE's proposals were determined to be in the competitive range for New York and Washington, D.C. Following discussions Corporate Health and EHE submitted their best and final offers by the January 21, 1986, due date.

On February 3, the FBI awarded contracts for medical services in New York City and Washington, D.C. to EHE and on February 13, Corporate Health protested to this Office these two awards. By letter dated February 27, the agency advised us that it determined under 31 U.S.C. § 3553(d)(2) (Supp. II 1984) that it is in the best interests of the United States to proceed with performance of the contract for medical services in Washington, D.C., notwithstanding the pendency of this protest.

#### New York Award

Corporate Health asserts with regard to the award for the New York field offices that the agency misapplied the RFP's evaluation criteria and that if the evaluation factors had been properly applied the agency would have awarded the New York portion to it. The protester asserts that although agency officials had advised it that the differences between its technical proposal and that of EHE were "minimal," the agency awarded the contract to EHE at a price almost \$20,000 higher than the protester's.

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<sup>1/</sup> Only the awards for the New York and Washington, D.C. areas are at issue because the protester received award for medical services for the Philadelphia field offices.

The solicitation's evaluation scheme allocated a total of 700 points for a proposal's technical approach and 300 points for lowest cost. Thus, the technical score comprised 70 percent of the total evaluation score and the price score comprised the remaining 30 percent. Under the evaluation scheme the lowest priced proposal would receive the full 300 points and the other proposals would be awarded fewer points corresponding to their proportionately higher prices.

While the agency has advised that it provided Corporate Health with a debriefing of its proposal on February 7, the agency has denied the protester access to the awardee's proposals, the evaluation score sheets, and evaluation summaries relating to the awardee, all of which have been submitted to this office for an in camera review in connection with the protest. Our discussion of the contents of such material is necessarily limited because of the agency's restriction on their disclosure. See Raytheon Support Services Co., B-219389.2, Oct. 31, 1985, 85-2 C.P.D. ¶ 495.

The agency advises that its technical evaluation of the proposals was conducted by three independent evaluation teams consisting respectively of DEA personnel, FBI headquarters personnel and FBI New York field office personnel. Another individual, an employee of the FBI laboratory in Washington, D.C., evaluated the laboratories which the offerors proposed to use. EHE's proposal received a total of 917 points in the evaluation--680 technical points and 237 points for cost whereas Corporate Health received a total of 867 points--567 technical points and 300 points for cost.

In its protest filed on February 13 with this Office the protester has not challenged the reasonableness of the agency's evaluation per se but contends that the two firms had submitted offers which were technically equal so that award should have been made to it as the low-priced offeror. The agency disagrees with the protester's contention that its proposal was technically equal to that of EHE's proposal. The FBI states that it views EHE's technical proposal, which was rated 113 points higher than the protester's proposal, as being "markedly superior."

Generally, an offeror in a negotiated procurement is not automatically entitled to award merely because it offered the lowest price. Henderson Aerial Surveys, Inc., B-215175, Feb. 6, 1985, 85-1 C.P.D. ¶ 145. There is no requirement in a negotiated procurement that award be made on the basis of lowest cost or price to the government unless the solicitation so provides. Systems Research Laboratories, Inc., B-219780, Aug. 16, 1985, 85-2 C.P.D. ¶ 187. We have consistently upheld awards to offerors with higher technical scores and higher costs, so long as the result is consistent with the evaluation criteria and the procuring agency determines that the technical difference outweighs the cost or price difference. Kelsey-Seybold Clinic, P.A., B-217246, July 26, 1985, 85-2 C.P.D. ¶ 90.

Here, all three evaluation teams and the employee who evaluated the laboratories rated EHE's technical proposal as being superior, overall, to Corporate Health's proposal and the narrative summaries by the evaluation teams are consistent with the 113-point higher technical rating received by EHE. On the basis of our in camera review we therefore conclude that the agency had a reasonable basis to decide that EHE's technical proposal was superior to that of the protester. Furthermore, we find the award to EHE, even though EHE's price of \$157,437 was approximately \$20,000 higher than the protester's, was consistent with the solicitation's evaluation criteria which accorded the technical evaluation a weight of 70 percent of the total evaluation.

Notwithstanding the emphasis on the technical criteria in the solicitation's evaluation scheme the protester asserts that cost, not technical superiority, was to be the primary consideration for contract award under the solicitation. This contention rests upon a statement in a November 13 agency report to our Office concerning a prior protest under this solicitation. See Metro Medical Downtown, B-220399, Dec. 5, 1985, 85-2 C.P.D. ¶ 631. In its report responding to Metro Medical's protest of the FBI's failure to provide it with a copy of the RFP, the agency concluded with the statement that it was attempting to "award this contract to the lowest responsive bidder who adequately meets [our] needs . . . . No effort, conscious or otherwise, has been made to exclude any bidder."

The protester's contention is without merit. As set forth above, the solicitation's evaluation scheme clearly emphasizes technical considerations over cost. The solicitation, not an agency report submitted in response to an earlier protest by another party on a different issue, provides the basis for the proposal's evaluation scheme. Thus, we reject the protester's contention that price was the most important factor for award.

Finally, at the conference held on this protest and in its subsequent comments on the conference and the agency report the protester for the first time objects to the agency's alleged "misevaluation" of its technical proposal. For example, Corporate Health disputes the findings of the evaluators that its medical facility in New York lacks separate waiting rooms for men and women. It would appear, and the protester has not indicated otherwise, that the information forming the basis for this ground for protest was known to Corporate Health as a result of the February 7 debriefing which it received from the agency.

Each new basis for protest first raised after the initial filing of a protest must independently meet the timeliness requirements of our Bid Protest Regulations. See Westinghouse Electric Corp., B-215554, Sept. 26, 1985, 85-2 C.P.D. ¶ 341. Accordingly, this new ground for protest is dismissed as untimely since it was filed with our Office more than 10 working days after the basis therefor apparently became known to the protester. See 4 C.F.R. § 21.2(a)(2) (1985).

#### Washington D.C. Award

EHE also received an award under the solicitation for the performance of medical services in Washington, D.C. EHE's proposal received higher scores than Corporate Health's proposal in the technical evaluation and for low cost. EHE's total point score was 996-- 696 technical points and 300 points for offering the low price. Corporate Health received a total point score of 910 points-- 652 technical points and 258 for cost. In its best and final offer EHE proposed a price of \$163,725 compared with Corporate Health's best and final offer in the amount of \$208,342.

Corporate Health contends that the agency improperly made award to EHE since a "cost realism evaluation" of EHE's proposal has not been conducted. The protester maintains

that the FBI should have performed a "cost realism ('should cost') analysis" because, even though EHE offered the lowest "estimated cost" its "proposed costs" are unrealistic.

At the outset, we note that the solicitation provided that a firm, fixed-price contract, or contracts, would be awarded. A firm, fixed-price contract provides for a definite price which is not subject to adjustment and this contract type places upon the contractor the risk and responsibility for all contract costs and resulting profit or loss. Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.202 (1984). Accordingly, "cost realism" bears little relationship to a firm, fixed-price contract where the prime concern is cost quantum. Los Angeles Community College District, B-207096.2, Aug. 8, 1983, 83-2 C.P.D. ¶ 175 at 4. Since a firm, fixed-price contract, in fact, was awarded pursuant to the solicitation for the medical services in Washington, D.C., a cost realism analysis was not required prior to award of the contract. See Clausing Machine Tools, B-216113, May 13, 1985, 85-1 C.P.D. ¶ 533.

We have recognized that at the discretion of the procuring agency a solicitation for a firm, fixed-price contract may provide for a cost realism analysis for such purposes as measuring an offeror's understanding of the requirements of a solicitation. See Los Angeles Community College District, B-207096.2, supra, 83-2 C.P.D. ¶ 175 at 4. In this regard, the protester contends that such an analysis should have been performed for this procurement for two reasons.

First, the protester maintains that the RFP requires a cost realism evaluation because its evaluation criteria include a formula for determining an offeror's "evaluated cost" and "weighted cost score." These phrases, however, are not related to the determination of the "realism" of an offeror's "costs" as there is no mention in the solicitation of "cost realism" nor is there any provision in the solicitation which provides for a "cost realism analysis." The RFP formula at issue is simply a method of allocating point values to proposals consistent with the firm, fixed-prices offered. This approach has been used in other firm, fixed-price procurements. See, e.g., Henderson Aerial Surveys, Inc., B-215175, supra, 85-1 C.P.D. ¶ 145 at 3.

Offerors were to use cost "matrix" forms attached to the RFP "for setting out pricing." There is nothing in these matrices which would indicate that they were to be used as part of a cost realism evaluation or analysis. The matrices essentially stated the approximate quantity of each medical service needed by the agency and required that the offeror indicate the "unit price" and the "total price" for each of the medical services to be provided and to indicate the sum of all of the total prices. The matrix for Washington, D.C., as amended, also requested offerors to submit the unit and total price of the "physician hourly fee" for the number of hours set forth in the matrix by the agency. The FBI states that the amended pricing matrix for Washington, D.C. was the result of its requirement that medical consultation be provided in addition to the required physical examinations and medical tests. Since these matrices requested prices for the required medical services and not the offeror's cost, these matrices cannot be construed as relating to cost realism. Therefore, we cannot conclude that the RFP provisions for the entry and point-scoring of prices required that a cost realism analysis be performed.

Second, Corporate Health asserts that a cost realism analysis is required by FAR, 48 C.F.R. §§ 15.803(a) and 15.805-3. The regulations cited by the protester respectively concern an agency's disclosure of cost and pricing data and techniques of cost analysis; they do not require that a cost realism analysis be conducted for a firm, fixed-price contract.

In its comments on the protest conference and the agency report Corporate Health now asserts that the agency has failed to conduct a price analysis of EHE's proposal price as is required by FAR, 48 C.F.R. § 15.805-2, and that such a price analysis would have resulted in a "downgrading" of EHE's proposal. The protester points out that the agency did not indicate in its March 21 report on the protest that it had carried out a price analysis of EHE's proposal. We dismiss this ground for protest as untimely.

Since Corporate Health's February 13 protest was predicated on its contention that the agency failed to carry out a "cost realism" evaluation prior to award to EHE, there was no reason for the agency to include in its report a discussion of price analysis as required by FAR, 48 C.F.R. § 15.805-2. If the protester suspected that a proper price

analysis of proposals may have not been carried out it should have raised that matter as one of the grounds in its initial protest and not wait to see if the matter of price analysis was addressed in the agency's report. Even if the date of receipt of the agency report, March 21, were viewed as the date that the basis of the protest regarding price analysis was first known to the protester, its subsequent protest concerning the lack of a price analysis, filed with our Office on April 8, is clearly untimely. See 4 C.F.R. § 21.2(a)(2) (1985). We note that a price or cost analysis based on cost or pricing data generally is concerned with whether an offeror's prices are higher than warranted considering its costs, Digital Equipment Corp., B-219435, Oct. 24, 1985, 85-2 C.P.D. ¶ 456, rather than whether they are too low.

The protester also asserts that EHE's price for the medical services in Washington, D.C. is unrealistically low and that as a result it will be impossible for EHE to carry out the contract using properly qualified physicians. Furthermore, Corporate Health asserts that EHE cannot abide by its proposal price during the term of the contract and thus will attempt to pass on to the FBI significant cost increases in each of the option years permitted under the contract.<sup>2/</sup> The protester asserts that EHE's much lower price constitutes an improper "buy-in."

To the extent that Corporate Health is now alleging that EHE cannot perform at its offered price, it is essentially challenging the agency's determination prior to award that EHE is a responsible contractor. Our Office does not consider protests concerning affirmative determinations of responsibility absent a showing that the determination may have been made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(f)(5) (1985); Bobwreen Consultants Inc., B-218214.4, Sept. 27, 1985, 85-2 C.P.D. ¶ 558. Neither exception is alleged here by the protester. Furthermore, the submission of a below-cost or a low profit offer is not illegal and provides no basis for challenging an award of a firm, fixed-price contract to a responsible contractor. The regulations require only that the contracting officer take appropriate action to ensure that losses due to below cost awards are not recovered. FAR, 48 C.F.R. § 3.501-2(a).

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<sup>2/</sup> The RFP provides that the offeror's unit prices will "prevail through the first (1) option year if exercised."



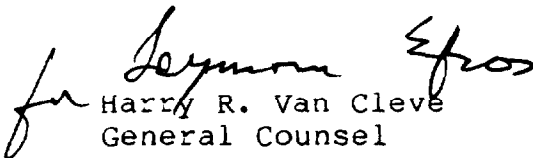
We do note that at the conference and in its comments on this protest the agency advised that EHE may have omitted one cost element from its price for conducting the stress tests. Although some of the specific information regarding this matter are regarded as proprietary information by the agency, as indicated by the agency at the protest conference, it appears to the agency that in pricing the stress tests for Washington, D.C., EHE omitted the price of the physicians' hourly fee from the price of the stress test. The agency advises that it therefore evaluated EHE's proposal on the basis of a higher price which it believes is actually involved (we note that by letter dated January 22, EHE verified its price for the stress tests as indicated in its best and final offer) and even with this adjustment EHE remained the low offeror although the price differential between its low offer and that of Corporate Health was reduced (thus increasing Corporate Health's point score). Although the protester has not objected to the agency's evaluation of EHE's price proposal on an adjusted price basis it contends that this apparent omission in EHE's price indicates that EHE was incapable of performing, a circumstance which emphasizes the need for a price analysis and casts doubt on the credibility of the agency's technical evaluation. As is set forth above, with certain exceptions not applicable here, our Office does not consider protests of affirmative responsibility determinations and the protest that the agency did not conduct a price analysis as required by FAR, 48 C.F.R. § 15.805-2, is untimely.

Concerning the protester's doubt about the credibility of the agency's evaluation of EHE's proposal, it is neither our function nor our practice to conduct a de novo review of proposals or to make an independent determination of their relative merit since the evaluation of proposals is the function of the procuring agency requiring the exercise of informed judgment. We will question the procuring agency's evaluation only where such evaluation was clearly unreasonable. See Battelle Memorial Institute, B-218538, June 25, 1985, 85-1 C.P.D. ¶ 726 at 4. Our in camera review of EHE's technical proposal and the evaluation's score sheets and summaries does not establish that the agency's technical evaluation of EHE's proposal was unreasonable. Thus, we see no reason to question such evaluation. In addition, our review of the record before us indicates that

the agency's estimate of the actual intended price of the stress tests to be conducted by EHE was reasonable. Even if we presume that EHE did in fact commit an error in pricing that item, which it seems to deny, it appears that the agency's price adjustment for the purpose of evaluating EHE's price was reasonable and that EHE was properly determined to be the low-price offeror. We point out that the protester has not alleged that but for the possible error in EHE's pricing of this one task Corporate Health and not EHE would have submitted the low priced best and final offer. On the contrary, the protester persists in accusing EHE of an improper "buy in" which, as we have stated above, does not present a proper basis for a legal objection to award.

Corporate Health also requests attorney's fees together with its proposal preparation costs. In view of our decision denying in part and dismissing in part its protests, its claim for these costs is denied. Norfolk Shipbuilding and Drydock Corp., B-219988.3, Dec. 16, 1985, 85-2 C.P.D. ¶ 667 and DSP Technology, Inc., B-220593, Jan. 28, 1986, 86-1 C.P.D. ¶ 96.

The protests are denied in part and dismissed in part.

  
Harry R. Van Cleve  
General Counsel